

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RENE M. PALMA

:

v.

:

Civil No. 3:00CV1128(AHN)

PHARMEDICA COMMUNICATIONS, INC.

:

RULING ON MOTION TO DISMISS

In this action, the plaintiff, Rene M. Palma ("Palma"), alleges that her employer, Pharmedica Communications, Inc. ("Pharmedica"), violated her rights under the Family & Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq.

Presently pending is Pharmedica's motion to dismiss count three of the amended complaint for failure to state a claim on which relief may be granted. For the following reasons, the motion [doc. # 10] is GRANTED.

STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), a court is required to accept as true all factual allegations in the complaint and must construe all well-pleaded factual allegations in the plaintiff's favor. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1992). A court may dismiss a complaint only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley

v. Gibson, 355 U.S. 43, 45-46 (1957); see also Still v. Debuono, 101 F.3d 888, 891 (2d Cir. 1996). The issue on a motion to dismiss "is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support his claims." United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 236).

FACTS

For the purpose of this motion to dismiss, the court accepts the following alleged facts as true.

Palma was hired by Pharmedica on December 6, 1990. In September, 1998, Palma's doctor told her that she needed gall bladder surgery. She informed her supervisor of her need for surgery and that she would have to take time off to recuperate. She also told her supervisor that her doctor was concerned that if she did not have surgery soon, she risked more gall bladder attacks, infection, and the possibility of an emergency procedure. Palma initially scheduled surgery for October, 1998, but postponed it because her supervisor said that Palma's absence in October would interfere with vacation plans and the department's traditionally heavy work load during that time.

At that time, Palma also asked if it would be possible for her to work three half days a week after she returned from surgery until she was fully recuperated. Palma's supervisor told her that she could not work reduced hours because it would set a

precedent for the whole company. Later, the day before her surgery, Palma again asked if she could work half days when she returned to work after her surgery, but her supervisor turned down her request.

Palma underwent surgery on November 20, 1998. On December 2, 1998, her doctor gave her a note stating that she was sufficiently recovered to return to "light duty" work for half days for approximately two weeks. At that point, Palma contacted the U. S. Department of Labor ("DOL") to ascertain her rights. The DOL told her that her employer would violate the FMLA if it did not permit her to work reduced hours.

Palma returned to work on December 7, 1998. She gave her supervisor the doctor's note, and again requested that she be permitted to work three half days a week. When her supervisor denied the request, Palma suggested she contact the DOL.

Her supervisor consulted counsel, and Palma was allowed to work half days from December 7 to 11, 1998. Because she was intimidated and concerned, she refrained from working additional half days.

Thereafter, her supervisor began taking work from her, excluded her from projects and from new assignments. On January 22, 1999, Palma was terminated for exercising her rights under the FMLA.

At no time before or after her surgery did Pharmedica

provide Palma with written notice of her rights under the FMLA or post any information regarding its employees FMLA rights.

Palma alleges that Pharmedica interfered with the exercise of her rights under the FMLA and terminated her employment in retaliation for seeking leave under the FMLA. In count three of the amended complaint, Palma alleges that Pharmedica violated the notice and posting requirements of the FMLA.

DISCUSSION

Pharmedica moves to dismiss count three, which alleges a violation of the notice and posting requirements of the FMLA. It maintains that the Second Circuit has held that an employee has no cause of action against an employer for failing to give notice of the terms of the FMLA. See Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 162 (2d Cir. 1999). In opposition, Palma maintains that Sarno only precluded a private right of action for violating the FMLA's notice provision if the lack of notice had no effect on the employee's attempt to exercise her leave rights. She maintains that Sarno doesn't apply in her case because she alleges that the lack of notice did interfere with the exercise of her FMLA rights. The court disagrees.

Under the FMLA, an employer is generally required to give an eligible employee up to 12 work weeks of leave per year for, inter alia, a serious health condition that makes the employee unable to perform the essential functions of her position. See

29 U.S.C. § 2612(a)(1)(D). The Act makes it unlawful for an employer to interfere with, restrain, or deny an employee's actual or attempted exercise of a right provided by the Act. See 29 U.S.C. § 2615(a)(1). The Act also provides that an employer must post on its premises a summary notice of employees' FMLA rights. See 29 U.S.C. § 2619(a).

In Sarno, the Second Circuit stated that because a "right to receive notice is not a right that the intended recipient of the notice 'exercise[s],'" 183 F.3d at 162, the court "decline[d] to interpret the FMLA as giving an employee a right to sue the employer for failing to give notice of the terms of the Act where the lack of notice had no effect on the employee's exercise of or attempt to exercise any substantive right conferred by the Act." Id.

In this case, Pharmedica's failure to post notice of the terms of the FMLA did not interfere with Palma's exercise of or attempt to exercise her FMLA rights. As the complaint alleges, Palma was permitted to work reduced hours as she requested. The fact that she did not exercise any right to do so after December 11, 1998, was not the result of Pharmedica's failure to post notice of her rights. Rather, as she alleges, she refrained from working half days because she was intimidated and concerned.

Thus, even if the court were to read Sarno as expansively as Palma suggests, she does not have a private right of action based

on the alleged facts for her employer's alleged violation of the FMLA's notice provision. See Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000) (noting that in Sarno, it considered and rejected the employee's claim that his FMLA rights were infringed by the employer's failure to inform him that the FMLA entitled him to a leave of up to twelve workweeks).¹

CONCLUSION

For the foregoing reasons, Pharmedica's Motion to Dismiss [doc. # 10] is GRANTED. Count three of the amended complaint is dismissed.

SO ORDERED this day of April, 2001, at Bridgeport, Connecticut.

Alan H. Nevas
United States District Judge

¹The court notes that a majority of other courts that have addressed this issue have held that there is no private right of action for an employer's violation of the FMLA's notice requirement. See e.g., Deily v. Waste Management of Allentown, 118 F. Supp.2d 539 (E.D. Pa. 2000) ("it is well settled that an employee has no private right of action for a violation of FMLA's notice requirement"); Latella v. National Passenger R.R. Corp., 94 F. Supp.2d 186, 189 (D. Conn. 1999) (holding that an employee does not have a private right of action for violation of notice requirement because the FMLA gives the Secretary of Labor the right to assess a civil penalty for violating § 2619 and does not authorize a private damages action); Blumenthal v. Murray, 946 F. Supp. 623 (N.D. Ill. 1996) (pointing out that because § 2617(a) makes an employer liable to an employee only for violating § 2615, there is no private remedy for violating the notice provision of § 2619).